

# Water Rights ADJUDICATION

Nebraska state law requires the **Nebraska Department of Natural Resources (DNR)** to, **“as often as necessary,” examine water appropriations to determine whether a water right is being utilized and is a valid appropriation, or whether the appropriation is subject to cancellation.**

This process to examine water appropriations is called an **adjudication process**. The



process is ongoing and DNR continues investigations as required, needed or as requested by other water users.

**The investigation** begins with DNR

doing a records search to determine what is permitted under the existing appropriation, by examining orders, court decisions, legal descriptions and maps describing the location and water appropriation. The next step is generally a **DNR field investigation** that includes inspecting the land and irrigation facilities with the landowner/tenant to determine if and how water has been used under the subject appropriation. Other sources of information can include irrigation district records, county tax records, Natural Resources

Conservation Service (NRCS) records, DNR diversion stream flow records and precipitation records.

Following the field investigation, DNR staff write a **“Report of Field Investigation”**, which generally includes an aerial photograph marked to show the location of lands irrigated **within the last three years**. Once a field investigation report is completed, it’s reviewed and a decision is made on whether a hearing on the appropriation is warranted.

**Nebraska statutes Section 46-229.02 states:** *If it shall*

*appear that any water appropriation has not been used for some beneficial or useful purpose or having been so used at one time has ceased to be used for such purpose for more than three consecutive years, the department shall appoint a place and time of hearing....* If only a portion of the water right is not used, a hearing is still required.



If a hearing is found necessary a **notice** is sent to all persons shown in DNR’s records as being an owner of the appropriation. A title search is conducted at the county register of deeds office to determine landowners under the appropriation. Notices are mailed registered or certified, approximately six weeks before the scheduled hearing to all persons who were found to have an interest in the appropriation. The notice describes the appropriation and gives the time and place of the hearing. Notices are also published in the county newspaper if there are out-of-state landowners, or if the property lies within a municipality.

**Adjudication hearings** are comparable to a court hearing with a DNR employee acting as the hearing officer, presiding over the hearing. A hired court reporter swears in the witnesses and records their testimony.

Another DNR employee acting as the hearing examiner will introduce exhibits and may or may not ask questions of the witness. The exhibits introduced by DNR include documents describing the water appropriation, notices, and the “Report of Field Investigation”. Once the report is received into record, it is the burden of the landowner, tenant, canal operator or other interested person to refute any incorrect information or to provide excusable reasons. By law, the DNR Report of the Field Investigation is *prima facie* evidence. This means the report is considered in the judgment of

the law to be sufficient to establish the facts contained unless rebutted or contradicted. **The law does expressly grant certain excusable reasons for non-use. All excusable reasons for non-use except one are valid for a period of not more than 10 years.**

## Excusable reasons are:

- The land subject to the appropriation was placed under an acreage reserve or production quota program or otherwise withdrawn from use as required for participation in any federal or state program;
- Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
- The available water supply was inadequate to enable the owner to use water for a beneficial or useful purpose;
- Use of the water was unnecessary because of climate conditions;
- Circumstances were such that a prudent person, following the dictates of good husbandry, would not have been expected to use the water;
- The works, diversions, or other facilities essential to use of the water were destroyed by a cause not within the control of the owner of the appropriation and good faith efforts to repair or replace the works, diversion, or facilities have been and are being made;
- The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis; or
- Legal proceedings prevented or restricted use of water.



**The only excuse for non-use that can exceed the 10-year period** is if a landowner of any tract of land uses all of the available water supply but on only part of the land under the appropriation because of an inadequate water supply.

After the individual presents his or her testimony, DNR staff will likely question the witness. The hearing is concluded when all parties are satisfied that all the facts have been presented and recorded.

**Testimony presented honestly and fairly is the best evidence landowners or appropriators can present to DNR during the adjudication process.**

### **Some basic suggestions on preparation for a water appropriation hearing are:**

- Review the copy of the field investigation report provided by DNR prior to the hearing;

- If, in the case of an irrigation appropriation, the field report does not show all the lands that have been irrigated within the last three years, mark an aerial photograph to show all the lands that have been irrigated and bring this to the hearing;

- You should be prepared to testify to the following:

1. When each field was last irrigated.
2. What crops have been grown on the field since it was last irrigated, or what has occurred on the field.
3. Why the field has not been irrigated since the last time it was irrigated.
4. What equipment do you have available to irrigate.

- If the water appropriation was not used because of an acreage reserve program or some legal action, bring copies of the documents showing proof;

**After the hearing**, the transcripts (including exhibits) are reviewed by DNR. A decision is made on the evidence presented and the Director of DNR issues a order to leave the appropriation in effect, modify the appropriation, or cancel the

appropriation. The order is sent to all parties appearing at the hearing and the appropriator.

Anyone **dissatisfied with the decision or order** has two avenues of recourse. A document requesting a rehearing may be filed in the Lincoln office of the DNR within 15 days from the receipt of the order. That filing must contain sufficient reasons for DNR to grant such a request. The second avenue is to file an appeal with the Court of Appeals within 30 days of the issuance of the order; a request for rehearing, if filed does not delay the time for filing an appeal.

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Permit holders who have additional questions regarding their water appropriation permit are encouraged to contact Department of Natural Resources personnel at the Lincoln office.

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**Nebraska**

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# The Water Rights Adjudication Process

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